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In the Supreme Court of the United States

OCTOBER TERM, 1982

TRAVELERS INDEMNITY COMPANY AND THE LIBERAL MARKET, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners assert that the Court of Claims erred in granting summary judgment for the government after the parties stipulated to the facts.

1. Petitioners brought this suit against the United States in the Court of Claims, seeking to recover the expenses of cleaning up an oil spill from the plant of petitioner The Liberal Market in Beaver Creek, Ohio. The spill resulted from vandals breaking into the plant and activating fuel pumps, which pumped oil onto the ground. The oil then ran into navigable waters (Pet. App. 2a). Petitioners sought to recover their cleanup expenses from the United States under Section 311(i)(1) of the Clean Water Act, 33 U.S.C. 1321(i)(1), which allows the owner or operator of an onshore facility from which oil has been discharged to recover from the United States the reasonable costs

incurred in cleaning up the discharge if the owner or operator can prove that the discharge was caused solely by the acts of a third party.

The parties stipulated to the facts (Pet. App. 7a-14a). The Court of Claims found, on the stipulated facts, that petitioners had failed to establish that they had taken reasonable precautions to guard against a foreseeable act of vandalism and that petitioners had therefore failed to meet their burden of proving that the oil discharge occurred *solely* as a result of the acts of a third party. The court accordingly granted the government's motion for summary judgment and denied petitioners' cross-motion.

2. The Court of Claims stated that the applicable standard of care required petitioners to take the precautions that were "reasonably required" to forestall the vandals' acts (Pet. App. 4a-5a). Petitioners do not appear to challenge this standard,[1] which has been applied in a long line of Court of Claims cases dealing with oil spills caused by vandals. *Anglo Fabrics Co.* v. *United States*, No. 279-77 (Ct. Cl. Mar. 20, 1981); *Union Petroleum Corp.* v. *United States*, 651 F. 2d 734 (Ct. Cl. 1981); *Proctor Wholesale Co.* v. *United States*, 215 Ct. Cl. 1049 (1978); *Chicago, M., St. P. and P. R.R.* v. *United States*, 575 F.2d 839 (Ct. Cl. 1978); *City of Pawtucket* v. *United States*, 546 F. 2d 430 (Ct. Cl. 1976).

Instead, petitioners assert that the Court of Claims "totally avoided deciding" whether The Liberal Market's "actions [were] reasonable and were adequate precautions taken to forestall vandalism" because, according to petitioners, the court "indicat[ed that] it did not have sufficient

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[1]See, *e.g.*, Pet. 14 (issue is whether "petitioner's conduct was reasonable or comported with the tort concept of due care").

facts to make a determination of reasonableness" (Pet. 13).[2] In fact, the court concluded that "[t]he stipulation does not suggest any reason why [vandalism] might not have been anticipated in the vicinity of Liberal's plant" (Pet. App. 5a). Moreover, the court ruled, nothing in the stipulation explained why Liberal was not reasonably required to take an obvious precaution — turning off a master switch to the pumps located in a place that was inaccessible to the vandals (*id.* at 5a-6a). The court stated that "[i]f the stipulation fails to show that the precautions were all that was reasonably required, the claim must fail" (*id.* at 5a); that is, petitioners had the burden of proof and they failed to meet it.

At no time below did petitioners claim that there was a genuine issue as to any material fact or that summary judgment was for any reason inappropriate. Petitioners did not attempt to indicate that an issue of fact existed by adding exhibits or affidavits after the government's motion for summary judgment was filed. Evidence that might have shown that Liberal took all reasonable precautions could easily have been introduced, if it existed; the court suggested, as examples, "municipal ordinances, underwriter's rules, or other standards that would be at least suggestive" (Pet. App. 6a). Having failed to produce such evidence when they had an opportunity to do so, petitioners are precluded from now claiming they were deprived of a trial on some material issue of fact. See, *e.g.*, *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 635 (1953).

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[2]Petitioners also urge that this Court "review the facts * * * and * * * determine that the actions of petitioners were reasonable and adequate and enter judgment accordingly" (Pet. 21). But that fact-bound issue plainly does not merit consideration by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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